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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 1022

DANIEL M. TABAS,

Petitioner,

vs.

ALICE IOLA HUDSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Miami, Florida

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida entered in the above-styled cause on November 17, 1965, wherein said Court dismissed the appeal from the decision and opinion of the District Court of Appeal of Florida, Third District, entered May 18, 1965, rehearing denied June 11, 1965, and reported in 175 So.2d 224.

CITATION TO OPINION BELOW

The order of the Supreme Court of Florida dismissing the appeal is not reported. A copy of same is, however, included in the Appendix hereto. The decision of the District Court of Appeal, of Florida, Third District, is reported at 175 So.2d 224.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S. Code 1257 (3), for the reason that rights, privileges and immunities are specially set up and claimed for the Petitioner under the Constitution of the United States.

QUESTION PRESENTED

Whether there is a right to contest an order of commitment for contempt of court for failure to obey an unappealed order to demolish a portion of a homestead on the grounds that the prior order was entered in violation of the Petitioner's rights as guaranteed by the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Involved herein are those portions of the Fourteenth Amendment to the United States Constitution which provide that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT

At all times pertinent to this cause, ALICE IOLA HUDSON and DANIEL M. TABAS have been and are adjoining homeowners in North Bay Village, a municipal corporation of Dade County, Florida.

In 1956, DANIEL M. TABAS constructed an addition to his home which, while on his own property, nevertheless violated the setback requirement of their municipality. ALICE IOLA HUDSON took no action therefor for some three years but did then bring suit for injunctive relief.

In July, 1963, DANIEL M. TABAS was ordered to demolish the offending portion of his homestead.

This decision was *not* appealed from.

On February 8, 1965, DANIEL M. TABAS was held in contempt of court and ordered incarcerated for a period of sixty (60) days or until he complied with the decree requiring that he demolish the portion of his homestead which transcended the setback requirement. This order was appealed to the District Court of Appeal of Florida, Third District, on the ground, *inter alia*, that the prior order of the Court was unlawful and violated DANIEL M. TABAS' rights as guaranteed by the Fourteenth Amendment to the United States Constitution. The Dis-

trict Court affirmed, holding that the propriety and lawfulness of the original order could not be challenged by an appeal from a subsequent order of contempt.

An appeal to the Supreme Court of Florida was dismissed.

REASONS FOR GRANTING THE WRIT

The Florida Courts have held that every unappealed order is the law of the case and is binding on the parties. Moreover, that the constitutionality of a prior order may not be challenged in a subsequent action for contempt for failure to obey the prior order.

To this extent, the decisions of the Florida Courts are squarely in conflict with this Court's decision in *Fields* v. *City of Fairfield*, 375 U.S. 248; 11 L.Ed.2d 311; 84 S.Ct. 360.

The Petitioner does not contend that an unappealed injunction may be disobeyed with impunity. To the contrary, it is Petitioner's position that an extremely narrow exception is to be carved out of the general rule to be found in the decision of the Supreme Court of the United States in *United States v. United Mine Workers of America*, 330 U.S. 258; 67 S.Ct. 677; 91 L.Ed. 884, wherein the Court held:

> "We find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings."

It is the Petitioner's position that where vital constitutional guarantees are at stake, it is the function and duty of the reviewing court, in contempt proceedings, to consider the validity of the prior injunction even though unappealed. We find firm authority for this proposition in the matter of *Fields v. City of Fairfield*, 375 U.S. 248; 11 L.Ed.2d 311, 84 S.Ct. 360. It developed that the Circuit Court in Alabama had issued an injunction prohibiting the holding of a meeting advertised by a political party. The order was not appealed from, but the meeting was held nevertheless. The officers of the party were subsequently adjudged in contempt for violation of the injunction, the Alabama court waiving aside the questions of the propriety of the injunction on the ground that it had been unappealed. The Supreme Court of Alabama, affirmed, stating:

> "Petitioners were guilty of contempt as they chose to disregard the temporary injunction rather than contesting it by orderly and proper proceedings."

Upon appeal from the Supreme Court of Alabama to the Supreme Court of the United States, the latter court, in a per curiam decision, reversed the judgment of the Supreme Court of Alabama. The necessary rationale of the decision is that where important constitutional rights are involved an appeal from an order of contempt can question the propriety of the original unappealed decree. In the case of *Fields*, the constitutional question evolved around freedom of speech. In the instant case, the constitutional question evolves around the ability to use one's own property as necessity dictates. Both are on the same constitutional level. The District Court of Appeal and the

Supreme Court of Florida erred in refusing to give this proposition any consideration. By so doing, they deprived the Petitioner of his rights as guaranteed to him by the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

TOBIAS SIMON
Counsel for Petitioner
223 Southeast 1st Street
Miami, Florida

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for a Writ of Certiorari has, pursuant to Rule 33(1) of the Rules of The Supreme Court of The United States, been served by mail upon Dixon, DeJarnette, Bradford, Williams, McKay & Kimbrell, Attorneys for Respondent, 900 Flagler Federal Building, Miami, Florida, this ____ day of _____, 1966.

_____

TOBIAS SIMON

APPENDIX A — OPINION BELOW

DANIEL M. TABAS,

Appellant,

v.

ALICE IOLA HUDSON,

Appellee.

No. 65-116

District Court of Appeal of Florida.

Third District

May 18, 1965.

Rehearing Denied June 11, 1965.

PER CURIAM.

THIS CAUSE involves a post-final decree order of commitment for contempt. This is the second appearance of this cause in this court. Upon a prior proceeding, reported in Hudson v. Tabas, Fla. App. 1962, 136 So.2d 243, this court upheld a chancellor's finding that the appellant and his wife had erected an encroachment upon property contiguous to the appellee's and affirmed a mandatory injunction requiring its removal, but returned the cause to the chancellor to determine the amount of damages sustained. Following the mandate in the prior opinion, the chancellor received evidence and entered a final decree awarding a judgment in the sum of $500.00 for which sum he let execution issue and, by an amendment to said decree, reaffirmed his prior ruling mandatorily requiring the appellant and his wife to remove the encroachments.

No appeal was prosecuted from this decree. Subsequent to a date set for the removal, a rule to show cause was filed indicating that the appellant and his wife had failed to comply with the mandatory injunctive features of the amended decree and, upon return to the rule, the appellant and his wife were adjudicated in contempt of court for failure to comply and the appellant, Daniel M. Tabas, was ordered committed to the County Jail for a period of 60 days for failure to comply with the injunctive features of the decree, as well as the failure to pay the money damages.

The instant proceedings were commenced, seeking a review of this order of commitment. An application for constitutional writ seeking to stay the effect of the order was filed (after denial by the chancellor of a supersedeas), pursuant to the provision of Rule 4.5, subd. g(1), Florida Appellate Rules, 31 F.S.A. Following argument on the application for constitutional writ, this court directed the filing of briefs expeditiously, pursuant to the provisions of Rule 4.5, subd. g(2), Florida Appellate Rules and stayed the effect of the commitment order pending final determination of the cause.

This being a post-final decree order, the appropriate method for appellate review is pursuant to those provisions of the rule providing for interlocutory appeal. See: Rule 4.2, sub. a, Florida Appellate Rules. By the assignments of error, the appellant urges error in the entry of the mandatory injunction; the order providing for payment of damages for depreciation; and the order of commitment for failure to pay a money judgment and for failure to obey the mandatory injunction. The appellant, Daniel M. Tabas, also urges he has a right to con-

test the validity of the injunction at this posture of the case, upon the authority of Fields v. City of Fairfield, 273 Ala. 588, 143 So.2d 177; Fields v. City of Fairfield, 375 U.S. 248, 84 S. Ct. 360, 11 L.Ed.2d 311. We reject this contention on the grounds that the United States Supreme Court, in Fields v. City of Fairfield, supra, did not hold that the propriety of the original unappealed decree could be challenged by an appeal *from a subsequent* order of contempt but, rather, held there was no evidence to support the order of contempt. See: Fields v. City of Fairfield, supra, and cases cited therein. Thus, the appellant may not complain of the fact that he is held in contempt of court for failure to obey the amended final decree imposing the mandatory injunction, on the ground that said decree is unlawful because he failed to appeal that decree, which he must obey. See: Howat v. State of Kansas, 258 U.S. 181, 42 S. Ct. 277, 66 L.Ed. 550; United States v. United Mine Workers of America, 330 U.S. 258, 67 S. Ct. 677, 91 L.Ed. 884.

The record on appeal contains substantial, competent evidence to support the trial court's finding the appellant in contempt for failure to obey the provisions of the mandatory injunction. Thus, the order, in this respect, should be affirmed. See: Davis v. Levin, Fla. App. 1962, 138 So.2d 351; Lamb v. Dade County, Fla. App. 1964, 159 So.2d 477; Seiff v. Presto Brick Machine Corp., Fla. App. 1964, 168 So.2d 700. However, that portion of the order appealed (purporting to incarcerate the appellant for failure to pay a money judgment) must be reversed as it constitutes imprisonment for debt, contrary to § 16, Declaration of Rights, Constitution of Florida, F.S.A.

Based on the foregoing, we affirm that portion of the order of contempt finding the appellant, Daniel M. Tabas, in contempt for failure to obey the mandatory injunction. We reverse that portion of the order of contempt purporting to incarcerate the appellant, Daniel M. Tabas, for failure to pay a money judgment.

Affirmed in part; reversed in part.

APPENDIX B — ORDER

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1965

WEDNESDAY, NOVEMBER 17, 1965

CASE NO. 34,440

DANIEL M. TABAS,

Appellant,

vs.

ALICE IOLA HUDSON,

Appellee

Appellee has filed motion to quash or dimiss appeal; and upon consideration thereof, said motion is granted and, it is ordered that the appeal be and the same is hereby dismissed.